STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL BURTON,

Defendant-Appellant.

UNPUBLISHED
May 29, 1998

No. 195231
Recorder's Court
LC No. 94-006798

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1), and solicitation of murder, MCL 750.157b; MSA 28.354(2), after the jury found that he had offered to pay his son and two other individuals to kill a man defendant thought was intimately involved with his ex-wife. Defendant was sentenced to life imprisonment for the conspiracy conviction and to twelve to fifteen years' imprisonment for the solicitation conviction. He appeals as of right. We affirm.

First, defendant argues that he is entitled to a new trial because the jury was deprived of the opportunity to hear evidence that defendant's son, Terry Clayton, was promised immunity in exchange for his testimony against defendant. We disagree. At the time of trial, both Clayton and Sergeant David Mallory testified that no promises of immunity were made. However, in support of his post-trial motion, defendant provided to the court a statement, signed by Clayton, in which Clayton, for all practical purposes, recanted his trial testimony regarding the alleged promises of immunity.

In general, a motion for new trial based on newly discovered evidence may be granted upon a showing that: (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Newly discovered evidence in the form of recantation testimony has, however, traditionally been regarded as suspect and untrustworthy and courts are therefore reluctant to grant a new trial on that basis. *Id.* at 559-560. After carefully reviewing the

record, we find that the recanted testimony is suspect and untrustworthy, that there was other evidence of promises of immunity presented at trial, and that a different result would not be probable on retrial. We therefore find that the trial court did not abuse its discretion in denying defendant's motion for new trial.

Next, defendant argues that his constitutional right of confrontation was violated because Clayton repeatedly claimed a lack of memory during cross-examination. We again disagree. Although there were periods when Clayton was obviously being uncooperative and evasive, after being appropriately admonished by the trial court, he cooperated. Defense counsel then vigorously cross-examined the witness and effectively impeached his credibility. As the United States Supreme Court noted in *Delaware v Fensterer*, 474 US 15, 21-22; 106 S Ct 292; 88 L Ed 2d 15 (1985):

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

Accordingly, defendant was not denied his constitutional right to confront Clayton.

Defendant next contends that the prosecutor committed misconduct that denied him a fair and impartial trial by repeatedly asking key witnesses questions calling for hearsay and, in closing arguments, referring to facts not in evidence. Defendant argues that he was thereby compelled to object, which left the jury with the impression that defendant wished to conceal incriminating evidence. We disagree.

Although the prosecutor did ask questions calling for hearsay, the trial court usually excluded the testimony upon defense counsel's timely objections. On other occasions, after the proper foundation was laid, the evidence was admitted. What transpired at this trial was nothing more than the adversarial process in action and did not deprive defendant of a fair trial. We further find that defendant's claim that the prosecutor referred to facts not in evidence is unsupported by the record. The prosecutor did nothing more than properly argue the evidence and all reasonable inferences arising therefrom. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In any event, the trial court instructed the jury that objections and arguments are not evidence and thereby eliminated any potential prejudice. *People v Harvey*, 167 Mich App 734, 747; 423 NW2d 335 (1988). Therefore, we find that defendant's claims of prosecutorial misconduct are without merit.

Next, defendant argues that he was denied a fair trial when the prosecutor elicited testimony that the trial court had previously excluded. We again disagree. During direct examination, Clayton volunteered that, after defendant discovered that the attempt on the victim's life had been unsuccessful, he went to Clayton's home and threatened Clayton's family with a gun. The court, after a sidebar, struck the testimony and instructed the jury to disregard it. Absent evidence to the contrary, the jury is presumed to follow cautionary instructions of the trial court. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Given the trial court's proper instruction to the jury to disregard the

testimony and the absence of any evidence that the jury failed to follow the instruction, we find that the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Finally, defendant contends that his convictions for conspiracy and solicitation violated the double jeopardy clause. We disagree. The double jeopardy provision of the Fifth Amendment of the United States Constitution, as well as its Michigan counterpart, Const 1963, art 1, § 15, protects citizens from suffering multiple punishments and successive prosecutions for the same offense. *People v Harding*, 443 Mich 693, 699, 703; 506 NW2d 482 (1993). "The issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent." *People v Pena*, 224 Mich App 650, 657; 569 NW2d 871 (1997). Statutes prohibiting conduct that is violative of distinct social norms are generally viewed as separate and, therefore, subject to multiple punishment. *Id.* The conspiracy and solicitation statutes at issue here have different aims. The crime of solicitation was intended by the Legislature to punish the initial instigator, whereas the crime of conspiracy was intended to address the increased danger of group action arising from an agreement to act illegally. See *People v Rehkopf*, 422 Mich 198, 207-208; 370 NW2d 296 (1985); *People v Vandelinder*, 192 Mich App 447, 452-453; 481 NW2d 787 (1992). Therefore, because there are differing statutory aims, punishing defendant for both convictions does not violate the prohibitions against double jeopardy. *Pena, supra* at 658.

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy